No. 82-1127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HELICOPTEROS NACIONALES DE COLOMBIA, S.A.,
Petitioner,

v.

ELIZABETH HALL, *et al.*,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Texas

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENTS

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Petitioner Helicopteros Nacionales de Colombia, S.A. (Helicol) hereby submits its reply to the Brief of Respondents Elizabeth Hall, *et al.*

REVIEW OF RESPONDENTS' STATEMENT OF THE CASE

On the jurisdictional issue before the Court, petitioner and respondents agree on the following jurisdictional facts:

1) Helicol has never maintained an office in Texas, Brief of Respondents, p. 6;

2) Helicol has never had any employees located in Texas, Brief of Respondents, p. 7;

3) Helicol has never had a designated agent for service of process in Texas, Brief of Respondents, p. 6;

4) Helicol has never been authorized to do business in Texas, Brief of Respondents, p. 6;

5) Helicol has never performed in Texas any of its business, which was and is helicopter transportation in South America, Brief of Respondents, pp. 6-7;

6) Helicol recruited no employees in Texas, Brief of Respondents, p. 7.

Respondents also concede that Helicol did no advertising and signed no contracts in the United States; had no employees, directors or officers located in the United States; had no offices, maintained no business records and did no work in the United States. Brief of Respondents, p. 7.

However, in an apparent attempt to divert attention from Helicol's lack of ties with Texas, respondents grossly exaggerate those few contacts Helicol did have with Texas. Brief of Respondents, pp. 3-6. An examination of respondents' list of Helicol's contacts with Texas reveals that all but a very few of the claimed contacts relate to Helicol's purchases of capital assets and training from Bell Helicopter Company (Bell) of Fort Worth, Texas.

Helicol does not dispute that it purchased approximately three million dollars worth of such equipment and training from Bell in the six-year period preceding the accident. Helicol, however, rarely dealt with Bell in Texas other than to take delivery of helicopters in Texas and receive the incidental training which Bell provided at its factory facilities. During the six-year period prior to the accident, the only documented correspondence between Helicol and Bell in Fort Worth, Texas, consisted of one letter and ten telexes.[1]

[1] The record below shows one letter addressed to Bell from Helicol (J.A. 126a, 136a, Ex. admitted, Transcript of Special Appearance

The record indicates that Helicol sent these communications from South America to Bell in Texas principally to confirm travel arrangements and orders made with the Bell representative in South America.[2] Respondents' attempt to cast the relationship between Helicol and Bell as one in which Helicol employees traveled to Texas to engage in an ongoing relationship with a stay-at-home Texas vendor is misleading and ignores the realities of the international business conducted by Bell through its representatives in South America.

Respondents also refer to negotiations between petitioner and Bell regarding Helicol's potential designation as a Bell repair facility in Colombia. Respondents characterize such negotiations, which never resulted in an agreement, as activity by Helicol within Texas. Brief of Respondents, p. 4. However, the record reflects that, while Helicol had informed Bell headquarters in Texas of such negotiations, the negotiations themselves were with Bell's representative in Colombia. (J.A. 90a; Record, Telex dated Sept. 7, 1976, Ex. to Written Interrogatories

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Hearing, pp. 216-217) and ten telexes to Bell from Helicol (J.A. 126a, 137a, 138a, 140a-143a; Record, Telex dated Sept. 7, 1976, Ex. to Written Interrogatories to Ben James Brown; Exs. admitted, Transcript of Special Appearance Hearing, pp. 216-217) from 1970 until the accident occurred in which respondents' decedents died.

[2] The record reflects that orders for helicopters were placed with Mr. Boris de la Piedra, Bell's agent in Colombia. (J.A. 136a, 142a, Ex. admitted, Transcript of Special Appearance Hearing, pp. 216-217). Bell had at least two other representatives in Colombia and, on occasion, its executives traveled to Colombia on behalf of Bell. (Record, Telex dated Sept. 7, 1976, Ex. to Written Interrogatories to Ben James Brown, Ex. admitted, Transcript of Special Appearance Hearing, pp. 216-217).

to Ben James Brown, Ex. admitted, Transcript of Special Appearance Hearing, pp. 216-217).[3]

The only contact Helicol had with Texas which was not related to purchases from Bell was a visit by its General Manager, Francisco Restrepo, to Houston, Texas, in October of 1974 for approximately six hours. Restrepo flew from South America to Tulsa, Oklahoma, to meet with a representative of Williams Brothers International, a member of Williams-Sedco-Horn, operating as Consorcio in Peru. In Tulsa, after engaging in discussions regarding the work which Williams-Sedco-Horn needed in Peru[4] (J.A. 104a-105a), Restrepo was asked to fly to Houston.[5]

At the meeting in Houston, Restrepo and the representatives of Williams-Sedco-Horn discussed, for approx-

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[3] When asked if Helicol had been negotiating back and forth with Bell, Restrepo answered: "Not directly with Bell. We have a representative [of Bell] in Colombia." (J.A. 90a).

[4] Respondents argue that no meeting at all occurred in Oklahoma, apparently in an attempt to enhance the significance of the Houston meeting. *See* Brief of Respondents, p. 2, n.1. Respondents completely disregard the testimony of Novak (J.A. 148a, Transcript of Deposition admitted, Transcript of Special Appearance Hearing, pp. 216-217) and Greenough (J.A. 104a-105a).

[5] The record is clear that Restrepo did not foresee that he would be asked to travel to Texas when he left Colombia. Restrepo was called in Colombia by George Littlejohn of Williams Brothers International and asked to come to Tulsa to discuss potential work in Peru with Littlejohn, whom Restrepo knew from a prior job. He planned to travel only to Oklahoma to speak with Williams. Once in Tulsa, he received a call from a Williams official who told him that Williams wanted him to attend a meeting in Houston. He was flown to Houston on Williams' corporate aircraft on the morning of October 3, 1974, and returned to Tulsa the afternoon of the same day. (J.A. 64a-65a, 73a-75a, 78a).

imately one hour, a potential contract for helicopter transportation services in Peru. (J.A. 78a). Such a contract was not, and indeed could not have been, entered into in Houston, Texas, as such would have been forbidden by Peruvian law. (J.A. 61a-62a).

Neither Helicol nor Williams-Sedco-Horn was contractually bound as a result of the meeting in Houston. The contract was not executed until November 1974 in Lima, Peru. (J.A. 12a-17a, Ex. admitted, Transcript of Special Appearance Hearing, pp. 216-217, J.A. 113a). The implication contained in respondents' brief that Helicol and Williams-Sedco-Horn entered into a contractual relationship at the Houston meeting is simply false. Brief of Respondents, p. 3.

Respondents' statement of the case is distorted in other ways. Respondents characterize activities of others as those of Helicol within Texas. For example, respondents state that Helicol entered into a contract in Texas with Rocky Mountain Helicopters of Provo, Utah (J.A. 151a, Transcript of Deposition admitted, Transcript of Special Appearance Hearing, pp. 216-217) for the use of a helicopter needed on the Williams-Sedco-Horn job. Brief of Respondents, pp. 4-5. The record reflects no dealings between Helicol and Rocky Mountain Helicopters occurring in Texas[6] (J.A. 82a-87a, 149a-152a, Transcript of Deposition admitted, Transcript of Special Appearance Hearing, pp. 216-217) nor does it evidence any instruction by Helicol to Williams-Sedco-Horn that Williams-Sedco-

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[6] After respondents indicate that one of petitioner's activities in Texas was a contractual understanding with Rocky Mountain Helicopters, Brief of Respondents, pp. 4-5 (item 3, p. 5), respondents concede that the record is unclear where the contract was negotiated or executed. Brief of Respondents, p. 5, n.4.

Horn utilize a Texas bank to make payment to Rocky Mountain Helicopters.

Helicol's contacts with Texas, then, consist only of the receipt of purchased equipment and services in Texas from a Texas vendor and the visit of one Helicol employee to Texas for a few hours in connection with a potential contract for the performance of helicopter services in Peru.

ARGUMENT

I

THE ASSERTION OF JURISDICTION BY THE COURTS OF TEXAS OVER A NON-RESIDENT ALIEN ON A CAUSE OF ACTION ARISING IN PERU AND UNRELATED TO TEXAS VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Respondents' mischaracterization of the record in this case is an attempt to bring the facts within the criteria established by the Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). Respondents agree that, as in *Perkins*, the causes of action asserted by them did not arise out of Helicol's contacts with the forum state. Brief of Respondents, pp. 14-15.

Petitioner and respondents also agree that the due process standard set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and applied in *Perkins*, is controlling. Brief of Respondents, pp. 10, 14-15.

Respondents acknowledge that, under *Perkins*, where the cause of action does not arise out of the defendant's forum contacts, the defendant's activities in the forum must be substantial and continuous and of the nature and quality as to justify the assertion of *in personam* jurisdiction. Brief of Respondents, pp. 10, 14-15. Respondents contend, however, that Helicol's activities within Texas

were substantial and continuous and of the required nature and quality under *Perkins*.

Respondents rely principally upon Helicol's purchases from Bell. The purchase of helicopters, parts and related training by Helicol from a Texas vendor does not constitute any part of Helicol's business of furnishing air transportation. While petitioner needed helicopters to operate its business in South America, *Perkins* plainly contemplates that a defendant must do much more than purchase capital items from a forum vendor to subject itself to the general jurisdiction of the forum state. In *Perkins*, the defendant had established its base of corporate operations in Ohio, thus justifying the assertion of general jurisdiction over it. The defendant in *Perkins* was, in effect, like any other Ohio resident who would be subject to *in personam* jurisdiction in Ohio on a cause of action arising anywhere. As *Perkins* indicates, general jurisdiction requires ongoing ties to the forum approaching domiciliary status.

Respondents apparently agree that Helicol's purchases of equipment and incidental operational and maintenance training alone do not provide a basis for general jurisdiction. Rather respondents urge that "regular purchases and training coupled with other contacts, ties and relations may form the basis for jurisdiction,"[7] over an unre-

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[7] There were, however, only relatively infrequent, irregular purchases of helicopters by Helicol. Five helicopters were purchased over the course of eight years. There were frequent but not regular purchases of helicopter parts, made as the need arose. The training of pilots and mechanics depended upon the purchase of helicopters, not upon some regular schedule of general pilot training, and was a nominal extra cost when compared to the cost of the helicopters and spare parts. (J.A. 135a, Ex. admitted, Transcript of Special Appearance Hearing, pp. 216-217).

lated cause of action.[8] Brief of Respondents, p. 14. Putting aside purchases as a basis for general jurisdiction, Helicol's only other contact with Texas was a single contract discussion in Houston.[9] The presence of one employee in Texas for approximately six hours cannot constitute other "contacts, ties and relations." This single contract discussion, even when combined with purchases from a Texas vendor for out-of-state use, does not create a permanent tie to Texas justifying the assertion of general jurisdiction over Helicol. These purchases and the single contract discussion are not the substantial and continuous

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[8] Respondents rely upon *Henry R. Jahn & Son, Inc.* v. *Superior Court*, 49 Cal.2d 855, 323 P.2d 437 (1958), for their claim that no distinction should be made for jurisdictional purposes between purchasing and selling. *Jahn*, however, involved specific rather than general jurisdiction. As the California Supreme Court emphasized, the cause of action in *Jahn* arose out of the defendant's activities within the forum state. Thus, *Jahn* provides no support for respondents' claim that general jurisdiction may be premised upon the transient presence of Helicol's employees within Texas for the purpose of taking delivery of purchased equipment and receiving training.

[9] Respondents rely upon other purported contacts with the State of Texas, in addition to purchases, for the exercise of general jurisdiction. Brief of Respondents, p. 13. They cite one occasion in which Helicol negotiated with Bell for the lease of a helicopter for use in Peru and requested a letter to enable Helicol to buy the same helicopter. The helicopter was neither bought nor leased but, in any event, such activity is a part of the purchasing activities discussed *supra*. Respondents cite as an additional Texas contact the payments made by Williams-Sedco-Horn from Texas to Rocky Mountain Helicopters. However, all invoices for payments owed to both Helicol and Rocky Mountain Helicopters were submitted to Williams-Sedco-Horn's office in Lima, Peru. Williams-Sedco-Horn independently selected a Texas bank from which to make such payments. Thus, these payments cannot constitute an additional contact by Helicol with Texas. *See* p. 5, *supra*.

activities approaching domiciliary status such as were present in *Perkins*.

The holding of the Supreme Court of Texas that Helicol's contacts with Texas provide a basis for general jurisdiction is a "mockery" of the due process clause. As held by the Court in *Kulko* v. *Superior Court*, 436 U.S. 84 (1978):

> To hold such temporary visits to a State a basis for the assertion of *in personam* jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment.

436 U.S. at 93.

II

THE DUE PROCESS CLAUSE LIMITS THE SOVEREIGN POWER OF TEXAS TO ASSERT JURISDICTION OVER HELICOL

Respondents have contended that if there are minimum contacts of a defendant with the state, that state may exercise *in personam* jurisdiction over that defendant if, in so doing, "the jurisdictional rights or power of another state under our federal system" are not infringed. Brief of Respondents, p. 15.

The issue in the case is not whether any other state may provide a jurisdictional alternative or whether there is "jurisdictional competition with any of [Texas'] sister states in this case." Brief of Respondents, p. 16. Rather the issue is whether Texas constitutionally asserted jurisdiction over Helicol on a foreign-based cause of action.

Limitations on state court jurisdiction embodied in the due process clause "are a consequence of territorial limitations on the power of the respective States." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294

(1980), *quoting Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958).

A state, as an incident of sovereignty, has the power to adjudicate a controversy arising in the territory of the state involving a nonresident defendant where the defendant, though not present in the state, had some minimal contacts with the state which gave rise to the controversy. Thus where a nonresident comes into a state on a transitory basis and leaves behind a tort or contract breach committed in the state, a state may constitutionally require the nonresident to return and defend the legal action based upon that tort or contract breach. A state may exercise such specific jurisdiction, as a matter of sovereignty, because the cause of action arose within the state out of the defendant's activities in the state.

Absent such specific jurisdiction, a state may exercise sovereignty over a defendant who is a resident of the state or who has established permanent ties or a presence within the territory of the state such as existed in *Perkins*. It is a proper exercise of sovereignty for a state to require a defendant to defend a lawsuit "in his own backyard." *See* Brief of Petitioner, p. 13, n. 8.

Respondents have discounted the territorial limitations on the power of state courts by arguing, in essence, that Texas has broader powers to assert jurisdiction over a cause of action arising in a foreign land involving an alien defendant than it would have over a cause of action arising in Oklahoma involving an Oklahoma defendant. However, as Professors von Mehren and Trautman have stated:

> No fundamental distinction needs to be drawn between the jurisdictional problems raised by litigation involving international elements arising in an American court, state or federal, and those raised by litiga-

> tion in which the nonlocal elements are connected with sister states . . . [T]he relevant constitutional considerations seem equally applicable to the interstate and the international case." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1122 (1966).

The due process clause is not simply concerned with the jurisdictional rights or powers of states *vis-a-vis* other states. The due process clause also serves to prevent states from exercising their powers of sovereignty to trespass upon the sovereignty of other nations, in violation of the rights of nonresident aliens. Limitations on the sovereignty of the states should, if anything, be more scrupulously observed when foreign countries and principles of international comity are involved.[10]

The constitutional limitations on state sovereignty do not permit Texas to assume jurisdiction over Helicol, a non-resident alien defendant, on a foreign-based cause of action.

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[10] According to Professors von Mehren and Trautman:

> [I]n establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.

von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1127 (1966).

III

RESPONDENTS' THEORY OF JURISDICTION BY NECESSITY VIOLATES THE CONSTITUTIONAL LIMITATIONS ON A STATE'S POWER TO ADJUDICATE FOREIGN-BASED CONTROVERSIES

In tacit recognition that jurisdiction cannot be asserted by Texas over Helicol under *International Shoe* and *Perkins*, respondents argue that the Court should assert jurisdiction over Helicol in order to provide respondents with a forum in the United States. Respondents rely upon a footnote in *Shaffer* v. *Heitner*, 433 U.S. 186, 211 n.37 (1977), as having left open such a "possibility." Brief of Respondents, p. 18. Respondents concede that no court has ever upheld *in personam* jurisdiction based upon a doctrine of "jurisdiction by necessity." *Id.*

In *Shaffer* the Court held that, absent sufficient minimum contacts between the forum and the defendants, the existence of defendants' property within the forum could not form the basis for *quasi-in-rem* jurisdiction. However, the Court specifically left open the question of whether the existence of property in the state might provide a sufficient basis for the assertion of *in rem* jurisdiction where no other forum is available. 433 U.S. at 211 n.37.

Even assuming that the Court would answer the foregoing question in the affirmative, to permit the assertion of *in personam*, as distinguished from *in rem*, jurisdiction simply on the basis that no other forum is available in the United States is contrary to every jurisdictional principle painstakingly developed by the Court in the century since *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

The *Shaffer* footnote cited by respondents is little more than an indication by the Court that rights in a *res* might still permissibly be adjudicated in the state where the *res*

is located, if no other forum exists. The distinction between *in rem* and *in personam* jurisdiction renders the *Shaffer* footnote irrelevant here.

Respondents' argument that jurisdiction in Texas should be upheld because another United States forum may not be available focuses solely upon the interests of the plaintiff. However, the plaintiff is not the focus of jurisdictional questions under *International Shoe* and *Perkins;* rather, the focus is on the defendant. *See Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980).

Even if the forum state's interest in providing a forum for its residents could be considered in assessing the fairness to the defendant, Texas has no *bona fide* interest in respondents. None of the respondents has ever been a Texas resident, nor were any of their decedents residents of Texas. Brief of Respondents, pp. 7, 9.

Respondents assert that jurisdiction by necessity should be permitted in this case as the "nature of the incident . . . virtually demands" a forum where Helicol, Williams-Sedco-Horn and Bell could be sued together. Brief of Respondents, p. 17. Once again, respondents have focused impermissibly on their own convenience. Due process, however, demands that the requirements of *International Shoe* and *Perkins* be met as to the defendant.

Respondents totally disregard the existence of forums in Peru and Colombia. Respondents' assumption that only an American court is fit to resolve the dispute reflects the provincial view, mirrored in the majority opinion of the Texas Supreme Court, that justice can be accorded only in United States courts and that a United States forum should always be available notwithstanding the constitutional limitations imposed upon state sovereignty.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Brief of Petitioner filed May 12, 1983, the judgment of the Supreme Court of Texas should be reversed and the cause remanded with instructions to dismiss for lack of *in personam* jurisdiction.

Respectfully submitted,

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Dated: September 14, 1983

CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this 14th day of September, 1983, served three copies of the foregoing Brief of Petitioner in Reply to Brief of Respondents upon respondents Elizabeth Hall, *et al.*, the only parties required to be served, by mailing such copies to their attorney of record in a sealed envelope, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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